UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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OFFICE OF
ECOSYSTEMS, TRIBAL AND
PUBLIC AFFAIRS

December 4, 2014

Mr. Scott E. Anderson
National Marine Fisheries Service
510 Desmond Drive SE
Lacey, Washington 98503

Mr. Tim Romanski
U.S. Fish and Wildlife Service
Washington Fish and Wildlife Office
510 Desmond Drive SE
Lacey, Washington 98503

Re: Draft Environmental Impact Statement To Analyze Impacts of Issuance by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service of Two Incidental Take Permits under Section 10 of the Endangered Species Act for Implementation of the Washington Department of Natural Resources' Aquatic Lands Habitat Conservation Plan
EPA Region 10 Project Number: 14-0016-NOA

Dear Mr. Anderson and Mr. Romanski:

The U.S. Environmental Protection Agency has reviewed the Draft Environmental Impact Statement to Analyze Impacts of Issuance by the National Marine Fisheries Service and the U.S. Fish and Wildlife Service of Two Incidental Take Permits under Section 10 of the Endangered Species Act for Implementation of the Washington Department of Natural Resources' Aquatic Lands Habitat Conservation Plan. We are submitting comments in accordance with our responsibilities under the National Environmental Policy Act and Section 309 of the Clean Air Act. Thank you for the opportunity to offer comment on the proposed action.

For a term of 50 years, Washington DNR is requesting coverage for potential incidental take of 29 species[1] for three categories of activity authorized on state-owned aquatic lands: aquaculture of shellfish, placement of overwater structures[2]; and log booming and storage. The HCP would provide measures to avoid, minimize, or otherwise compensate for potential incidental take of covered species.

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[1] The covered species include 5 amphibians and reptiles (Columbia spotted frog, Oregon spotted frog, Northern leopard frog, Western toad, Pacific pond turtle), 5 birds (Harlequin duck, Common loon, Western snowy plover, Black tern, Marbled murrelet), 18 fish (Pacific lamprey, Green sturgeon, White sturgeon, Coastal cutthroat trout, Pink salmon, Chum salmon, Coho salmon, Steelhead trout, Sockeye/kokanee salmon, Chinook salmon, Bull trout, Pacific herring, Eulachon/Pacific smelt, Bocaccio, Canary rockfish, Yelloweye rockfish, Pacific sand lance, Surf smelt), and 1 marine mammal (Southern Resident killer whale).

[2] Overwater structures include: docks, wharves, rafts, boat ramps, boat launches, hoists and lifts, mooring buoys, nearshore buildings, floating homes, marinas, and shipyards and terminals.

The DEIS identifies Alternative 2 as the preferred alternative, in which ITPs issued to Washington DNR would apply to both marine and freshwater offshore, nearshore, and littoral environments that are state-owned. Alternative 1, No Action, and Alternative 3, wherein the ITPs would apply only to marine state-owned aquatic lands and cover 23 species[3], are also analyzed in the DEIS. The HCP Operating Conservation Program contains: (1) conservation measures specific to the three categories of covered activities; (2) standards that would apply to all uses authorized by Washington DNR, including non-covered programs[4]; (3) programmatic[5] measures that would stem from current Washington DNR conservation programs and authorities through which additional focus upon covered species and habitats would yield conservation benefits; and (4) management practices of Washington DNR.

We commend the Services and Washington DNR for their collaborative efforts to contribute to the recovery of ESA-listed species, other species of management concern, and their associated habitats. In particular, we recognize Washington DNR for the planned sound stewardship, conservation, and improved management practices for previously unaddressed authorized uses, such as private recreational docks, mooring buoys, and floating homes. We also agree that including shellfish aquaculture among the covered activities is important, as it is reasonable to anticipate increasing demand for shellfish aquaculture operations, which will present challenges, such as potential cumulative effects upon species and habitats and pressure to lease remaining healthy aquatic environments. We believe that all components of the Operating Conservation Program are appropriate and necessary to reduce the potential for uses of state-owned aquatic lands to adversely affect physical and biological resources.

We fully support the Aquatic Lands HCP and the Services' Preferred Alternative 2 and, therefore, rate the Draft EIS/HCP as LO, Lack of Objections. We offer the enclosed comments and recommendations with the intent to support, clarify, refine, and where possible, strengthen components of the HCP. We also acknowledge a basic concern for whether or not Washington DNR and the Services will have sufficient resources and long-term support to implement this 50-year program. A sustained effort by Washington DNR, the Services, and a sustained commitment by the Washington State Legislature to fund the various components of this conservation program – all of which are important to achieving the stated goals and objectives – will be necessary.

We appreciate and commend Washington DNR for the considerable outreach, information, and general assistance they have provided for the EPA and for the full array of stakeholders throughout the HCP development process.

[3] Alternative 3 would not cover fresh water species and habitats, thereby eliminating the 4 amphibians, the Pacific pond turtle, and the black tern from ITP coverage.
[4] The HCP would not apply to areas under port management agreements or to WSDOT transportation projects (HCP p. 5-4).
[5] Current WDNR programs that would contribute additional conservation benefits to covered species include: the Aquatic Reserves Program, the Conservation Leasing Program, Commissioner's Orders, the Aquatic Lands Restoration Program, and the Derelict Vessel Removal Program.

Please feel free to contact me at (206) 553-1601 or via electronic mail at reichgott.christine@epa.gov or contact Elaine Somers of my staff at (206) 553-2966 or via electronic mail at somers.elaine@epa.gov if you have questions or would like to discuss our comments. We look forward to the Final EIS and HCP in the coming months.

Sincerely,

Christine B. Reichgott, Manager
Environmental Review and Sediment Management Unit

Enclosures:
1. U.S. Environmental Protection Agency Detailed Comments on the Washington DNR Aquatic Lands HCP and Draft EIS
2. U.S. EPA Rating System for Draft EISs

cc: Lalena Amiotte, Washington DNR

U.S. Environmental Protection Agency
Detailed Comments on the
Washington DNR Aquatic Lands HCP and Draft EIS

Definitions/consistent use of terms

It would be helpful to define the terms "mitigation", "conservation measures", "avoidance and minimization measures", "compensation", and other related terms in a manner consistent with Clean Water Act definitions, and to use them in a consistent manner throughout the DEIS, HCP, and Implementation Agreement. For example, Goal 1 of the HCP (HCP, p. 5-3) is written as "Avoid *or* minimize effects on covered species and their habitats," and subsequent Objectives use this same language. The documents should be clear that a sequencing approach would be taken: first take all actions to avoid the impact and to demonstrate why impacts cannot be avoided; secondly take all actions to further minimize the impacts; and third compensate remaining unavoidable impacts.

> *Recommendation:* Define these terms in accord with CWA and use them with consistency in the HCP, DEIS, and Implementation Agreement.

Overwater Structures

Complex and multiple element structures (marinas, shipyards, and terminals). The buffers to avoid dredging and scour caused by propellers on motorized watercraft (HCP p. 5-11, #1) are very specific, and we question how such prescriptions would be implemented when watercraft are operated by tenants of the lessee who may not be aware of these restrictions. It would also be helpful to know how these buffers were derived and whether they are adequate or should be enlarged to account for error in implementation.

> *Recommendations:* Provide a reference(s) for the proposed depth and horizontal distance buffers from aquatic vegetation. Discuss whether these buffers would be adequate for large or powerful vessels, such as tugboats, that may be using these overwater structures.

Regarding grating requirements (HCP p. 5-11, #4) and other BMPs in the nearshore environment, it would be helpful to clarify how the nearshore environment would be defined where turbid waters occur. As per the glossary definition, the "nearshore" environment is shallow waters where sunlight reaching benthos supports submerged vegetation growth. This is generally considered to be 66 feet in depth, beyond which the Washington DNR aquatic lands are considered to be "offshore". However, in a more turbid estuary such as Commencement Bay or other such locations in Puget Sound, it is unclear whether piers and docks would be required to grate overwater structures as described in this BMP, or whether a uniform depth definition would be applied.

Docks, piers, and wharves. For item #1, HCP page 5-13, structures associated with motorized watercraft, our comment is the same as stated above for marinas, shipyards, and terminals.

> *Recommendation:* Provide clarification as to how an appropriate buffer is established to avoid propeller effects on aquatic vegetation. Explain how the prescribed distances and depths specified here and elsewhere in the HCP are determined to be effective and how they would be implemented/enforced.

Because a piling supported structure can contribute to blocking sediment transport in the nearshore or littoral area, it would be helpful to include in this section consideration for structure design that includes

the fewest number of pilings required for the structure's purpose (presumably this would occur anyway since it would be less expensive to construct).

> *Recommendation:* Consider including the above as guidance as long as safety and sound engineering are fully incorporated in structure design.

As overwater structures are removed and replaced, EPA would like to share that we are working on an update to the *Best Management Practices for Piling Removal and Replacement*, which was last updated in March 2007. We will be happy to provide the final BMPs when they are available in early 2015.

> *Recommendation:* Apply the updated BMPs for Piling Removal and Replacement when they become available from EPA.

Mooring buoys. We support the prescriptions for mooring buoys in the HCP (HCP p. 5-15). Because it seems that mid-line floats and embedded anchors would be difficult and costly for Washington DNR to inspect and confirm, it would be helpful to know how Washington DNR would enforce this measure (e.g., potentially through scheduled required inspections/maintenance in the use authorizations).

> *Recommendation:* Discuss how mooring buoy specifications would be implemented and enforced.

Floating homes. We concur with the inclusion of floating homes in the Operating Conservation Program. While floating homes are authorized, housing is not a water-dependent use, and we believe it is important to avoid additional non-water dependent impacts to the nearshore and littoral environments.

Shellfish Aquaculture

Conservation measures for all authorizations.

To effectively avoid and minimize impacts to native submerged aquatic vegetation, benthic surveys should be required for all new, expanding, or relocated shellfish aquaculture operations. This should be stated in the conservation measures for all authorizations for shellfish aquaculture (HCP p. 5-15), as well as in the "Protection of Native Aquatic Vegetation" section (HCP p. 5-31). Currently this appears only in specific sections, such as for floating raft aquaculture activities (HCP p. 5-17). There is also no mention of compensation for impacts to native submerged aquatic vegetation.

> *Recommendations:* Ensure that benthic surveys for native aquatic vegetation are included in baseline and subsequent monitoring requirements for all use authorizations. Discuss the issue of compensatory mitigation for direct or indirect impacts to native aquatic vegetation from Washington DNR authorized uses.

Predator exclusion devices. We support the HCP measures (HCP p. 5-15) for management of predator exclusion devices, yet due to the high volumes of PVC and netting and because aquaculture is the top source of marine plastics debris globally[1], we believe more can and should be done to address this issue. For example, each net, PVC pipe, or other predator exclusion device should be labeled with the identity and location of the aquaculture operation where it is used. This would identify the source of problem PEDs and enable problem correction and compliance. Also consider whether aquaculture operations that

[1] A. Shaffer, Coastal Watershed Institute, 2014.

are located in areas of high winds should be prohibited from using PEDs, and whether operations should be authorized in such locations.

PEDs are not the only form of marine debris stemming from shellfish aquaculture. For example, mussel aquaculture uses high density polyethylene disks to hold the weight of the shellfish. These also become dislodged and contribute to benthic litter.

> *Recommendation:* Add labeling requirements for PEDs and other shellfish aquaculture devices that contribute to marine debris to the conservation measures for shellfish aquaculture. Consider withdrawing exposed areas that are subject to high winds from consideration for new or renewed use authorizations for shellfish aquaculture operations that use PEDs or other devices that may result in marine debris.

Floating raft aquaculture activities. Item #1 (HCP, p. 5-17) states that rafts shall not be located *above* existing aquatic vegetation to avoid shading or deposition of materials from the aquaculture operation. However, because the sun is not directly overhead at this latitude, there should also be a prescribed buffer surrounding aquatic vegetation to prevent shading from floating raft aquaculture.

> *Recommendation:* Include a sufficient buffer around aquatic vegetation to prevent shading from aquaculture rafts.

Per item #2, the requirements for pre- and post-benthic surveys should be outlined with respect to timing, level of effort, and the components of the survey, including what kind of documentation would suffice to assert a pre-existing condition. The basic requirements of what must be included in a "record" that is available for review and how long the records are maintained should be established to ensure effective long-term implementation, enforcement, and adaptive management.

> *Recommendation:* In the Final HCP/EIS, please include requirements to meet the above survey information and record keeping needs.

Native aquatic vegetation conservation measures for shellfish aquaculture activities. Every effort should be made to avoid impacts to aquatic vegetation from new or renewed leases, particularly as the demand for additional and expanded aquaculture operations increases. Regarding items #2a and 2b (HCP p. 5-18), it is unclear whether a 25 ft. setback or a smaller setback via an adaptive management approach would be adequate to protect native aquatic vegetation, particularly where mechanical harvest methods would be used. Aquatic vegetation is ephemeral and can appear and disappear from year to year depending on conditions, with the edges of patches also varying from year to year. These prescriptions would appear to allow aquaculture boundaries to enlarge during years when aquatic vegetation dies back without providing for its subsequent return and patch edge variation. A minimum setback may be necessary to ensure that aquatic vegetation will have sufficient room to thrive unimpaired in its current location and have room to potentially move and expand over time.

The adaptive management option (2b) is undefined and may require considerable staff time and expertise to implement. The HCP should discuss the adaptive management information feedback loops and how the Services and other agencies would be included in decisions made based on the evaluations.

Recommendations: Both options 2a and 2b should establish a minimum initial setback from aquatic vegetation and include an explanation and/or reference regarding its adequacy. Consider enlarging the setback for Option 2a to account for historic observed/documented variations in location and area of aquatic vegetation. Option 2b, adaptive management, should be further defined and designed in a precautionary manner with clear action triggers, thereby not precluding patch dynamics and edge variations over time.

For clarification, it would be helpful for the Aquaculture Native Aquatic Vegetation Conservation Measures to reference and be consistent with the terminology, definitions, and types of vegetation to be included in the Standards for "Protection of Native Aquatic Vegetation" (HCP p. 5-31 through 5-34). For example, the shellfish aquaculture section uses a variety of terms for native aquatic vegetation, such as vegetation, aquatic vegetation, native aquatic vegetation, submerged aquatic vegetation.

Conservation Measure 8 (HCP p. 5-17). The HCP should define "change in suitability" for surf smelt and sand lance spawning areas.

Recommendation: Indicate how "change in suitability" for surf smelt and sand lance spawning would be determined and what types of activities would likely cause a change in suitability. Ensure that use authorizations are precautionary and disallow such activities.

Log booming and storage

Conservation Measures 7 and 9 (HCP p. 5-19). The HCP should discuss, provide in an appendix, or reference sources for the standardized protocols for performing wood waste underwater surveys and for establishing baseline benthic conditions. Include the threshold for determining the need for an interim cleanup[2] and what would factor into the weight of evidence analysis at the termination of a use authorization. The details of these surveys and implementation of the conservation measures will determine whether these conservation measures would be protective.

Recommendation: Provide the above information in the Final HCP.

Conservation Measure 8, (HCP p. 5-19). The Services state (DEIS p. 4-21) that Washington DNR should locate new facilities where the associated uses have historically occurred to avoid adverse effects in new areas. However, Washington DNR states (HCP p. 5-19) that new and expanded log transfer sites and in-water storage facilities would not be established in areas not meeting state or federal water or sediment quality standards. While 303(d) listed waters must not be further impaired for the parameters for which they are listed, it appears counterproductive to potentially degrade unimpaired waters with new facilities. Pollution prevention and anti-degradation should drive siting decisions with the intent of avoiding impacts to healthy aquatic lands and waters and directing unavoidable impacts to locations that are already affected. This would not eliminate the need, however, for enacting pollution prevention, clean up, and compliance with applicable TMDLs to restore impaired waters and aquatic habitats.

Recommendations: Re-evaluate Washington DNR's criteria for siting new log transfer facilities. Protect and avoid clean sites; give preference to re-use of sites that are already degraded. However, degraded sites should not be authorized for use until controls are in place to prevent

[2] An example of an interim threshold bark accumulation level used by EPA in Alaska in previous years was described as "100 percent coverage exceeding both one acre in size and a thickness greater than 10 cm (3.9 inches) at any point".

further degradation, and an Ecology-approved TMDL or other restoration program is implemented to restore water quality and ecosystem health.

We recommend considering the following additional BMPs that may be useful for log transfer and storage use authorizations:

- Require a limit on the size of the log transfer facility area (e.g., 1 acre) so the area of bark accumulation is limited.
- Require that in one LTF, there be only one area for log transfer from water to land, and that it be the same area as the transfer of land to water (if transfers occur in both directions).
- Although new and expanded LTFs would be located beyond the nearshore or littoral area to avoid nearshore and shoreline areas (conservation measure #11), similar to the restrictions for native aquatic vegetation, LTFs should also not be located near or in the vicinity of the mouths of salmon-bearing streams, forage fish spawning areas, or other sensitive sites.

Standards

Bank armoring, breakwaters. We are pleased with the standards for bank armoring and breakwaters and fully support their implementation. We note that the "Implementation" section for breakwaters lists fewer issues than the "Standard" discussion (HCP p. 5-22). Rather than stating only "...do not block long-shore current or fish passage", we suggest including "...and will allow long-shore transport of sediment, fish passage, and water circulation".

Derelict structures and abandoned equipment. As mentioned above, in early 2015 the EPA will provide Washington DNR with updated BMPs for Piling Removal and Replacement.

Fill. We suggest melding or co-locating the bullets regarding "Disposal of dredged material" (HCP p. 5-25) and "Environmental restoration, beach nourishment, or enhancement projects" (HCP p. 5-26). This would serve to emphasize that there are beneficial environmental uses of dredge material, such as where it is used to help sustain natural processes to compensate for anthropogenic alterations to the natural environment.

Pressure washing (HCP p. 5-28). In the final HCP, it would be helpful to explain why contaminants are slower to disperse in shallow water habitats and/or whether reduced dilution is the concern.

Protection of native aquatic vegetation (HCP p. 5-31 through 5-34). Much of the discussion of this standard deals with shading and buffer distances. However, other standards (such as precluding dredging for sand and gravel, removal/prevention of hard bank armoring, and sustaining sediment transport processes) also have considerable effects on sustaining and recovering native aquatic vegetation. It may be useful to point to these connections in the standards discussions.

Standards for protecting forage fish spawning habitat (HCP p. 5-37), #1. We recommend specifying in use authorizations that nearshore riparian shading in the upper intertidal would preferably be from native upland vegetation.

Implementation (HCP p. 5-40): We applaud Washington DNR's intent to seek restoration opportunities for forage fish spawning habitats and to promote conservation practices on Washington DNR managed uplands that are adjacent to forage fish spawning habitat, such as maintaining nearshore riparian buffers and marine sediment sources. To assist in this effort, we recommend Department of Ecology's recent Publication No. 14-06-016, April 2014: *Puget Sound Feeder Bluffs – Coastal erosion as a sediment source and its implications for shoreline management.*[3]

Programmatic Measures

Conservation leasing on state-owned aquatic land (HCP p. 5-44). We support Washington DNR's commitment to examine state statutes controlling lease rates and to propose rate changes that would support the conservation leasing program. We agree this would provide a valuable incentive to potential conservation lessees. We also support the commitment to evaluate other forms of agreements to allow private individuals and organizations to conduct conservation activities on state owned aquatic lands.

Aquatic Restoration Program. This program has great potential and we are happy to see it. However, we understand that the $300,000 provided bi-annually by the Washington State Legislature will be divided among three Washington DNR aquatic districts. While we recognize that these funds can be used as seed money that can be supplemented with federal, state, and other restoration program grants, it seems that this may not be adequate funding for restoring healthy ecological conditions. This potential lack of restoration funds underscores the importance of and need for emphasizing protection of healthy aquatic lands; applying a precautionary approach to all facets of the program; avoiding impacts and preventing pollution.

Aquatic landscape planning (HCP p. 5-47). Aquatic landscape planning is an exciting prospect, and has potential to be a valuable tool. We recognize that such an effort may require significant staff time and resources. With the other added responsibilities in the HCP, it would be helpful to convey how Washington DNR would obtain the resources to make this a worthwhile and well-vetted effort.

Management Practices

Private recreational docks (HCP p. 5-50 through 5-52). We commend Washington DNR for addressing recreational docks and setting a goal of 65% compliance with HCP standards in 50 years. It would be helpful to clarify in the HCP whether provisions for private recreational docks would apply only within areas that have a developed aquatic landscape plan (wherein proactive assessment of all docks and work with property owners to meet the HCP standards would occur), or whether they would apply elsewhere.

> *Recommendation:* Clarify how implementation of HCP standards for private recreational docks would differ in areas with aquatic landscape plans vs. areas without aquatic landscape plans.

Applying the HCP to use authorizations and renewals

The Draft EIS shows that there is a substantial backlog and high volume of upcoming use authorization renewals that will need to be addressed (Table 5.1, p. 5-8). It would be helpful to indicate the expected timeline needed to handle this workload, whether it will affect the ability of the agency to conduct other HCP actions such as compliance visits/inspections, and whether targeted prioritization can be done.

[3] https://fortress.wa.gov/ecy/publications/SummaryPages/1406016.html

Recommendation: Provide information regarding how Washington DNR would manage the pending workload for use authorizations and compliance. Consider prioritizing use authorizations in the same manner as compliance visits, which are to be based on the activity's potential for impacts to covered species and habitats (HCP p. 5-9).

Adaptive Management

Appendix F contains a framework for conducting adaptive management; however, no specific commitments have been established for evaluation and adaptive management with respect to any component of the Operating Conservation Program. Much work remains to establish the adaptive management program, which will include developing agreed-to commitments and performance measures as well as establishing baseline, compliance, and effectiveness monitoring and reporting programs. This will require the involvement of and collaboration with many other entities and jurisdictions statewide. It would be helpful to have information about adaptive management programs that have been successfully established and implemented for other HCPs.

Recommendation: Consider providing information in the Final EIS and HCP regarding the levels of success and timeframes needed to establish and implement adaptive management programs for other operative HCPs.

Implementation Agreement

The following specific recommendations would help to clarify the Implementation Agreement:

- Section 3.0, Definitions: Define the term "mitigation" as it is used in the Implementation Agreement. It appears to apply as an umbrella term that encompasses all HCP conservation measures, programmatic strategies, standards, management practices and any other applicable provisions of the HCP that would serve to avoid, minimize, and/or compensate for impacts to covered species and their habitats.
- Section 9.2, Changed Circumstances Not Provided for in the Plan: Explain what process would be used to request, negotiate, and potentially obtain Washington DNR's consent if the Services determine additional measures are warranted for changed circumstances.
- Section 10.4, No increase in Take: This is an important statement to include in the IA, but it is unclear what the "amount and nature of Take" is for each of the species listed and covered in this HCP. Include information to define or a means to determine the acceptable amount and nature of Take for each species.
- Section 11.0, Land Transactions: The IA should require that there be clear, legally binding language in any Washington DNR Aquatic Lands transfer agreement to ensure that the entity to which the lands are transferred would continue management in conformance with the HCP. The alternate approach, wherein Washington DNR would offset the conservation value likely to be lost as a result of such transfer, is vague and provides no clear commitment to ensure an acceptable offset and adequate protection/maintenance of the lands. We recommend the IA be modified to indicate that this alternative "offset" approach would be applied only in rare circumstances, and following specific protocols outlined in the HCP to address these issues.
- Section 13.2, No monetary damages: It would be helpful to clarify the relationship between Section 13.2 and Section 13.4, Enforcement authority of the United States. It appears that no Party to the IA can sue another Party for monetary damages resulting from failure to comply with the IA, but can be found in violation of the ESA and be subject to fines.